

Supreme Court, U.S.

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No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SUPPLEMENTAL
MEMORANDUM FOR THE PETITIONER**

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Pursuant to this Court's Rule 15.8, the Solicitor General, on behalf of the Secretary of Agriculture, respectfully files this supplemental memorandum to inform the Court of the enactment of new federal legislation based on bills that were introduced after the filing of our petition and that are cited in respondents' brief in opposition and our reply brief.

In their brief in opposition, respondents noted that, "in both the House and Senate, Bills to reform and extend agricultural programs are under consideration." Br. in Opp. 14 n.15, citing S. 1541, 104th Cong.,

2d Sess. (1996), and H.R. 2973, 104th Cong., 2d Sess. (1996). Respondents observed that "[t]hese Bills include language stating that 'generic' advertising of agricultural commodities increases total market." Br. in Opp. 14 n.15, citing S. 1541, *supra*, § 961, and H.R. 2973, *supra*, § 602.

In our reply brief, we noted that a provision regarding generic advertising similar to the provisions cited by respondents was included in a third bill that had passed both Houses of Congress. Reply Br. 7 n.6, citing H.R. 2854, 104th Cong., 2d Sess. § 501 (passed Senate Mar. 28, 1996). We also stated that the bill had not yet been signed by the President. Reply Br. 7 n.6. The bill was signed into law, however, on the day that our reply brief went to press, as the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888 (enacted Apr. 4, 1996).

The provision regarding generic promotion programs, to which the brief in opposition and our reply referred, was enacted as Section 501 of the FAIR Act, 110 Stat. 1029-1031, and is reproduced in the appendix hereto (App., *infra*, 1a-5a). Subsection (a) of that provision defines "commodity promotion law[s]" to include "the marketing promotion provisions under section 8c(6)(I)" of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 608c(6)(I), which is the Act at issue here. FAIR Act § 501(a)(1), 110 Stat. 1029; App., *infra*, 1a. Subsection (b) sets forth congressional findings concerning, *inter alia*, the need for and effectiveness of "generic commodity promotion programs established under commodity promotion laws." See, *e.g.*, FAIR Act § 501(b)(1), 110 Stat. 1030; App., *infra*, 2a. Subsection (c) generally requires every commodity board established under a

commodity promotion law to fund periodic, independent evaluations of the generic promotion program that it administers, to submit the results of those evaluations to the Secretary, and to make the results publicly available. FAIR Act § 501(c), 110 Stat. 1031; App., *infra*, 4a-5a. Finally, subsection (d) relates to the administrative expenses of such programs. FAIR Act § 501(d), 110 Stat. 1031; App., *infra*, 5a.

The FAIR Act also grants the Secretary new authority with regard to the generic promotion of agricultural commodities. See FAIR Act §§ 511-526, 110 Stat. 1032-1048. He may, on petition or his own initiative, issue orders establishing boards to develop and carry out, under his supervision, nationwide generic promotion programs funded by mandatory assessments on handlers (and importers, with respect to imported commodities). See FAIR Act §§ 514-517, 110 Stat. 1035-1043. In determining whether to issue such an order, the Secretary may take into account the existence of generic promotion programs established under other federal laws (such as the AMAA). FAIR Act § 514(b)(3), 110 Stat. 1035. He may also conduct an initial referendum to determine whether the order is favored by the persons to be covered by the order. FAIR Act § 518(a), 110 Stat. 1043. After an order goes into effect, the Secretary is generally required to hold such referenda periodically to determine whether the persons covered by the order favor its continuation. FAIR Act § 518(b), 110 Stat. 1043-1044. If the Secretary determines that the order is not favored by the persons voting in a referendum, he must suspend or terminate the order. FAIR Act § 522(a), 110 Stat. 1047; see generally H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 406-407 (1996), repro-

duced at 142 Cong. Rec. H2820-H2821 (daily ed. Mar. 26, 1996).

As stated in our reply brief (at 7 n.6), the enactment of Section 501 does not diminish the need for further review in this case; nor, if review is granted, will enactment of Section 501 complicate resolution of the question presented. The same holds true for the provisions in the FAIR Act granting the Secretary *additional* authority to establish generic promotion programs.* Indeed, those provisions, together with Section 501, underscore the broad importance of the constitutional question presented by this case.

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For the foregoing reasons and those stated in the petition and the reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1996

* We observe that, although the latter provisions are similar to provisions included in one of the bills cited by respondents, respondents did not argue that the enactment of those particular provisions would weigh against further review. See Br. in Opp. 14 n.15; H.R. 2973, *supra*, §§ 601-615.

APPENDIX

Section 501 of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, provides in pertinent as follows:

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.

In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes-

- (1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937;
- (2) Public Law 89-502 (7 U.S.C. 2101 et seq.);
- (3) title III of Public Law 91-670 (7 U.S.C. 2611 et seq.);
- (4) Public Law 93-428 (7 U.S.C. 2701 et seq.);
- (5) Public Law 94-294 (7 U.S.C. 2901 et seq.);
- (6) subtitle B of title I of Public Law 98-180 (7 U.S.C. 4501 et seq.);
- (7) Public Law 98-590 (7 U.S.C. 4601 et seq.);
- (8) subtitle B of title XVI of Public Law 99-198 (7 U.S.C. 4801 et seq.);

(1a)

(9) subtitle C of title XVI of Public Law 99-198 (7 U.S.C. 4901 et seq.);

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. 6101 et seq.);

(11) subtitle E of title XIX of Public Law 101-624 (7 U.S.C. 6301 et seq.);

(12) subtitle H of title XIX of Public Law 101-624 (7 U.S.C. 6401 et seq.);

(13) Public Law 103-190 (7 U.S.C. 6801 et seq.);

(14) Public Law 103-407 (7 U.S.C. 7101 et seq.);

(15) subtitle B;

(16) subtitle C;

(17) subtitle D; or

(18) subtitle E.

(b) **FINDINGS.** - Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture-

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the

governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

(10) These generic commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.

(11) Periodic independent evaluation of the effectiveness of these generic commodity promotion programs will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met.

(c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS. - Except as otherwise provided by law, each commodity board established under the supervision and oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other

programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

(d) ADMINISTRATIVE COSTS. - The Secretary shall annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on administrative expenses on programs established under commodity promotion laws.

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